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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEO LEROY LINKOGLE,

Defendant and Appellant.

D060959

(Super. Ct. No. MH105683)

APPEAL from an order of the Superior Court of San Diego County, Joan P.

Weber, Judge. Affirmed.

Leo Leroy Linkogle was civilly committed as a sexually violent predator (SVP) to an indeterminate term following a bench trial. On appeal he asserts there is not sufficient evidence to support his commitment because the trial court relied on "stale" expert evaluations in finding he met the criteria for commitment under the Sexually Violent Predator Act (SVPA). He also asserts that his equal protection rights were violated by the court order for an indeterminate term of commitment.

We affirm the judgment.

## FACTUAL BACKGROUND

### A. *People's Case*

#### 1. *Qualifying acts*

Linkogle stipulated he committed qualifying sexually violent offenses. In 1961, when he was 15, he attempted to sodomize his 10-year-old half-brother. In 1964 he was convicted of statutory rape of a 16-year-old girl. In 1967 he was convicted of molesting two girls, ages four and seven. In 1975 and in 1983, he was convicted of molesting seven-year-old girls he met at swimming pools. In 1996 Linkogle was convicted of twice molesting a four-year-old girl over the course of two days.

#### 2. *Expert testimony*

Dr. Christopher Matosich interviewed Linkogle in late October of 2010. However, after about 30 minutes, Linkogle concluded the interview. Dr. Matosich's evaluation also consisted of a review of existing records, including criminal history records and reports and psychological evaluations.

Dr. Matosich diagnosed Linkogle with pedophilia, either bipolar disorder or schizoaffective thought disorder, and dementia. Dr. Matosich noted Linkogle's 35 years of sexually deviant behavior, with repeated apprehension and punishment, with no determent of his behavior. He opined that this demonstrated a severe deviancy that was unremitting. He also noted that Linkogle admitted that he is a pedophile and that he loves children.

Dr. Matosich conducted standardized risk-assessment testing using the Static 99, 99-R, 2002 and 2002-R and concluded there existed a serious and well-founded risk

Linkogle would reoffend. Dr. Matosich believed Linkogle was predisposed to reoffend and commit sexually violent acts if released.

Dr. Matosich viewed Linkogle's dementia as a separate, mutually exclusive diagnosis from his pedophilia. He believed Linkogle's dementia caused him to act out sexually. Dr. Matosich pointed to three serious rules violations for sexually related behavior towards staff as recent as 2010. Dr. Matosich did not believe Linkogle's dementia would prevent him from molesting again. He opined that dementia can be considered a protective factor in the context of the risk of reoffense when it incapacitates an individual to the extent they physically cannot act out in a sexually aggressive manner. However, Dr. Matosich did not believe Linkogle's dementia was at a level it could be considered a protective factor. Dr. Matosich was aware of the defense expert's opinion concerning the severity of Linkogle's dementia, and it did not affect his conclusion that Linkogle met SVP commitment criteria.

On November 3, 2010, Dr. Craig Updegrave evaluated Linkogle and interviewed him for an hour and a quarter. He reviewed his criminal history and medical records. He diagnosed Linkogle with pedophilia, dementia, and borderline intellectual functioning. During the interview Linkogle was conversant and, although sometimes difficult to understand, was able to recall a significant amount of information from his past. Linkogle told Dr. Updegrave that he had molested between five and 13 children. He stated he "never want[ed] to see another kid as long as [he] live[d]" because he would molest again. He also told Dr. Updegrave that when he masturbates he "guesse[s]" that he thinks about children.

On August 24, 2010, Linkogle was evaluated by another doctor. Dr. Updegrove reviewed that evaluation. Linkogle told that doctor that he hoped he would not molest again, but did not have any idea how to control himself in the community because he had an irresistible impulse to molest. On August 30, 2010, Linkogle told another doctor that he was terrified to be out on the streets because he did not know what would happen. He had no family support or anywhere to live.

Linkogle admitted touching hospital staff in a sexual manner. Linkogle's record showed that he had disciplinary violations in 2008 when he touched male and female staff members inappropriately and told a female staff member in an aggressive manner, "I love you." In July 2010 Linkogle asked a female staff member if he could touch her, followed another female staff member, and tried to bump a female staff member in the hallway.

Dr. Updegrove conducted standardized risk-assessment testing using the Static-99 R and Static-2002 R and concluded there was a serious and well-founded risk that Linkogle would reoffend. Dr. Updegrove considered the fact Linkogle had dementia and also considered his physical condition. He believed Linkogle was likely to reoffend based upon his pedophilia and opined that his dementia could actually increase his risk of reoffending. Dr. Updegrove based this opinion on the impact dementia has on the cognitive ability to resist impulses. Linkogle's recent touching of staff members while in custody also supported his conclusion regarding Linkogle's likelihood of reoffending. Dr. Updegrove was aware of the evaluations conducted by the defense experts, but those evaluations did not change his opinion about Linkogle's disorders. Dr. Updegrove

believed that Linkogle needed treatment for his disorder and that he met the criteria for involuntary commitment under the SVPA.

*B. Defense Case*

Dr. Richard Clipson interviewed Linkogle in December of 2010 and again in February and August of 2011. He agreed that Linkogle had the requisite qualifying offenses and mental disorder to be classified as an SVP. However, he did not believe that Linkogle posed a substantial risk of harm to others because of the severity of his dementia and overall physical condition and that he therefore did not qualify for SVP commitment.

At his first meeting with Linkogle in December 2010, Dr. Clipson noted his difficulty in walking and his shuffling gait. That gait was often associated with late-stage Alzheimer's-type dementia. He also noted Linkogle's difficulty in dealing with saliva. Many times he would drool or spit on the floor. He did not appear to know what to do with the saliva.

Linkogle had difficulty controlling his bladder and soiled himself during the interview. Linkogle's speech was also somewhat difficult to understand. He was nonresponsive and gave inaccurate statements about his past.

Dr. Clipson administered the Mini Mental State Exam, a screening measure for neuropsychological functioning. He scored in the severely impaired range, scoring below the first percentile for men of his age and education level.

Dr. Clipson interviewed Linkogle again in February 2011. Testing indicated that his dementia was so advanced that all areas of cognitive functioning were now impaired.

The universally low scores indicated that he had progressed to the severe stage of dementia, having the intellectual functioning of a three- or four-year-old. Individuals at such a level of dementia are incapable of living independently. They can only reside in secure Alzheimer's units.

Linkogle's records from his recent time in county jail reflected no aggressive or inappropriate sexual touching. That fact was also significant to Dr. Clipson's conclusion that Linkogle was unlikely to reoffend. The lack of documentation of inappropriate touching since the previous year suggested the risk of him doing so had decreased. His behavior now was centered on getting food. As his condition worsens, he will act out less and become more and more quiet.

The general life expectancy of a person with dementia is eight to 10 years. Linkogle's other conditions, including hypothyroidism, diabetes and elevated cholesterol, are likely to worsen the dementia.

Dr. Lewkowicz interviewed Linkogle in July, September and October of 2011. Dr. Lewkowicz opined that Linkogle required 24-hour skilled nursing care, psychiatric services, and "the ability to maintain physical containment." Dr. Clipson agreed with Dr. Lewkowicz's opinion that Linkogle required 24-hour skilled nursing care because of his dementia. Such facilities are typically locked and children are rarely permitted on the premises. If they are present, they are always supervised by adults.

In addition to the expert testimony, Linkogle presented testimony from jail staff. Those witnesses testified that they had not seen him behave in an inappropriate sexual manner.

### *C. Court's Ruling*

Following the bench trial in this matter, the court ordered Linkogle committed as an SVP, finding beyond a reasonable doubt that he posed a substantial risk of reoffending. In doing so, the court concluded that Linkogle's severe dementia "does not inhibit his ability to continue to discuss with honesty the nature and extent of his sexual urges and desires." The court found that Linkogle was "a man with little volitional control, who—who seems to be incapable, even in a jail or prison setting, of not acting out on these profound sexual desires. . . ." The court rejected the opinion of Dr. Clipson, finding the opinions of the state's experts more credible. In doing so, the court stated, "I just strongly disagree with Dr. Clipson . . . who seems to think that the dementia has just taken over and all of those sexually deviant behaviors that he has had for 35, 40 years are now gone. And I don't see where he comes up with that, because we have a man who is probably one of the most honest, forthright people I've ever seen evaluated by any mental health professionals, and when I read Dr. Updegrove's extensive interview with this man, you see what appears to be still a profound preoccupation with sex and particularly sex with children."

## DISCUSSION

### I. SUFFICIENCY OF THE EVIDENCE

#### A. *The SVPA*

The SVPA "provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVP's." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 902 (*Ghilotti*).) An SVP is a person

convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to others in that it is likely he or she will engage in sexually violent criminal behavior. (Welf. & Inst. Code, § 6600, subd. (a)(1).) " 'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (*Id.*, subd. (c).)

When the secretary of the state Department of Corrections and Rehabilitation determines an individual who is either serving a determinate prison sentence or whose parole has been revoked may be an SVP, the director shall, at least six months before that individual's scheduled date for release from prison, refer the person for evaluation.

(§ 6601, subd. (a)(1).) Each person found likely to be an SVP is evaluated in accordance with a standardized assessment protocol to determine whether the person is an SVP. (*Id.*, subd. (c).) "The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Ibid.*)

" 'The trier of fact is charged with determining whether the requirements for classification as an SVP have been established "beyond a reasonable doubt." ' " (*Ghilotti, supra*, 27 Cal.4th at p. 904.) " '[W]here the requisite SVP findings are made, "the person



shall be committed for two years to the custody of the [Department of Corrections] for appropriate treatment and confinement in a secure facility . . . ." ' ' " (*Ibid.*)

### B. *Analysis*

In determining the sufficiency of the evidence to support a commitment under the SVPA, we apply the same test we apply when reviewing the sufficiency of the evidence to support a criminal conviction. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.)

"Thus, this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be ' ' "of ponderable legal significance . . . reasonable in nature, credible and of solid value." ' ' " (*Ibid.*) "In reviewing the record to determine the sufficiency of the evidence[, we do not] reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment." (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

Linkogle asserts that his dementia and physical condition worsened since the state's experts conducted their evaluations in October and November of 2010, making their opinions invalid and "stale," as opposed to Dr. Clipson's, because he interviewed Linkogle in 2011. However, the state's experts considered the opinions of the defense experts that were based on more recent evaluations than the state's experts, and still concluded that Linkogle presented a substantial risk of reoffending. Indeed, the state's experts concluded that Linkogle's dementia actually exacerbated his pedophilia. Their opinions were supported by his recent disciplinary violations where he acted out in a

sexually inappropriate manner with staff. Linkogle himself admitted in 2010 that he had an "irresistible impulse" to molest and did know what would happen if he were released.

At most, Linkogle points to a disagreement amongst experts. This does not support overturning the court's ruling. "The credibility of the experts and their conclusions [are] matters [to be] resolved . . . by the [trier of fact]" and we are "not free to reweigh or reinterpret [that] evidence." (*People v. Mercer, supra*, 70 Cal.App.4th at pp. 466-467.) As stated above, the court accepted the opinions of the state's experts and rejected the opinion of the defense expert. Therefore, substantial evidence supports the trial court's conclusion that Linkogle should be committed as an SVP.

## II. *EQUAL PROTECTION CHALLENGE*

In November 2006 voters passed Proposition 83, which modified the commitment under the SVPA from a two-year term, renewable if the prosecution proved beyond a reasonable doubt that the person still met the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of evidence that he is no longer an SVP. (*People v. McKee* (2010) 47 Cal.4th 1172, 1184, 1186-1188 & fn. 5 (*McKee I*).)

" ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' ' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

In *McKee I*, the court held that persons committed under the SVPA are similarly situated to persons committed under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.) and persons committed under the Lanterman-Petris-Short Act (Welf. &

Inst. Code, § 5000 et seq.) after being found not guilty by reason of insanity (Pen. Code, § 1026 et seq.). (*McKee I*, *supra*, 47 Cal.4th at pp. 1203, 1207.) Mentally disordered offenders may be committed as a condition of parole for renewable one-year periods. (*McKee I*, at p. 1202; Pen. Code, §§ 2970, 2972, subds. (a), (c).) Persons found not guilty by reason of insanity may be committed up to the maximum prison sentence for the underlying crime, with possible two-year extensions. (*McKee I*, at p. 1207; Pen. Code, § 1026.5, subds. (a)(1), (b)(1).)

In *McKee I*, the court held the defendant's claim of disparate treatment would be reviewed under the strict scrutiny standard. (*McKee I*, *supra*, 47 Cal.4th at pp. 1197-1198.) The court concluded, however, that "[b]ecause neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities between SVP's and [mentally disordered offenders], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." (*Id.* at pp. 1207-1208.) The Supreme Court remanded the matter to the trial court for further proceedings consistent with its opinion. (*Ibid.*)

Following remand, the trial court found that the People presented substantial evidence to support a reasonable perception that SVP's pose a unique or greater danger to society than MDO's and NGI's. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1347, review denied Oct. 10, 2012 (*McKee I*).) This evidence included testimony from experts that SVP's pose a higher risk of reoffending than mentally disordered offenders (MDO's)

or those not guilty by reason of insanity (NGI's). (*Id.* at pp. 1340–1342.) The People also presented evidence that victims of sexual offenses go through greater trauma than victims of other traumas because of the intrusiveness and long-lasting effects of sexual assault or abuse. (*Id.* at pp. 1342–1344.) These effects include psychological, physiological, social and neuropsychological consequences on the victim. (*Ibid.*) Additionally, the People presented substantial evidence that SVP's have significantly different diagnoses and treatment plans than MDO's and NGI's and that indeterminate commitment supports SVP's compliance and success rate of those treatment plans. (*Id.* at p. 1347.)

On appeal, we independently reviewed the evidence and agreed that the People had established "'the inherent nature of the SVP's mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP's pose a great risk [and unique dangers] to a particularly vulnerable class of victims, such as children'; and that SVP's have diagnostic and treatment differences from MDO's and NGI's, thereby supporting a reasonable perception . . . that the disparate treatment of SVP's under the amended [SVPA] is necessary to further the state's compelling interests in public safety and humanely treating the mentally disordered." (*McKee II, supra*, 207 Cal.App.4th at p. 1347.) We concluded that the disparate treatment of SVP's under the act "is reasonable and factually based" (*id.* at p. 1348) and, therefore, that the SVPA does not violate the SVP's constitutional right to equal protection of the law. (*Ibid.*)

*McKee II* is now final as the California Supreme Court has denied review. Thus, based upon our holding in *McKee II*, we conclude Linkogle's equal protection challenge is unavailing.

#### DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.